

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,

Petitioner,

v.

JOHN WILLIAM McKELVEY III,

Respondent.

Alaska Supreme Court
No. S-17910

Alaska Court of Appeals No. A-12419
Superior Court Case No. 4FA-14-00040 CR

RESPONDENT'S EXCERPT OF RECORD
VOLUME 1 OF 1

VRA Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

PETITION FOR HEARING FROM THE DECISION OF
THE ALASKA COURT OF APPEALS

LAW OFFICE OF ROBERT JOHN
s/Robert John/
ROBERT JOHN
Alaska Bar No. 8911069
P.O. Box 73570
Fairbanks, Alaska 99707
907-456-6056
Counsel for John McKelvey

Filed in the Supreme Court of the
State of Alaska, this 9th day
of May, 2022.
Joyce Marsh Deputy Clerk

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Subject: RE: John McKelvey: Additional Discovery Requested

From: "Crail, Elizabeth F (LAW)" <elizabeth.crail@alaska.gov>

To: 'ROBERT JOHN' <rjohn@gci.net>

Fri, 04 Apr 2014 19:45:19 +0000

Robert –

Just so you know, I wasn't ignoring you. I was trying to collect up all the information and confirm all the answers before I responded, and people were slow in getting back with me. However, it looks like I have all the answers at this point:

1. It looks like Judge Harbison has ordered the informant information with the exception of his/her name to be provided.

We are accordingly forwarding you the redacted criminal history.

There are no training records and no contracts.

There was no formal agreement with the CI. He/she was contacted for a MICS III charge and agreed to work. Due to successful work as a CI, we have decided not to proceed with the MICS III charges.

2. The plane did not have GPS running. It was a line of sight flight directed by Sgt. Moore. Therefore there were also no flight plans or flight logs. The estimated height of the flyover was about 600-1000 feet agl. They were flying a marked Alaska State Trooper Super Cub.
3. All the photos and video have been placed in Evidence, and, as far as I can tell, discovered.
4. Ditto for the audio.
5. There are no additional reports. The only other non-AST involved persons were the ATF agents and Inv. Goetz. None of them wrote any report or supplement.

The [REDACTED] stuff was a mistake. Not sure how it happened to get copied and marked for McKelvey, but it is evidence for an entirely unrelated matter, nothing to do with the drug unit even. Please destroy that.

Otherwise, I show you should have the following digital evidence:

- 1 entry video 15.59.24 are the last digits.
- 3 audio files – 2 windows media and one dss file
- One folder with 10 photos
- One folder with 11 photos
- One folder with photos IMG_1756-1983.

Exc. 400

EXHIBIT A Page 1 of 2

That should be everything.

Elizabeth F. Crail

Assistant District Attorney

Department of Law, Criminal Division

Fairbanks, AK 99701

(907)451-5970

From: ROBERT JOHN [mailto:rjohn@gci.net]

Sent: Tuesday, March 18, 2014 12:33 PM

To: Crail, Elizabeth F (LAW)

Subject: John McKelvey: Additional Discovery Requested

Elizabeth, I am hereby requesting the following additional discovery in this case: 1. The identity of the informant and any deals, contracts, and training records related to that informant; 2. GPS, altimeter, flight plans, flight logs, and any other information about the flyover of McKelvey's property and any other property on August 24, 2012; 3. Any additional photos and videos taken by any person present during or otherwise involved with the execution of the search warrant in this case; for example, the disc labeled UAF Entry Video says [REDACTED]; 4. Any additional audio from any of the person present during or otherwise involved with the execution of the search warrant in this case; and 5. Any additional reports or other writings prepared by any person present during or otherwise involved in the execution of the search warrant in this case. I would note that to date I have received nothing from Special Agent Bill Moore or Special Agent Brent Price. This request expressly encompasses, but is not limited to, them and any other federal, state, or municipal agent. Robert

Exc. 401

EXHIBIT A Page 2 of 2

Search Warrant No. 4 FA _____ SW.

TURNING TO THE SPECIFICS OF THIS CASE:

On 8/22/12 at approximately 1309 hours, I received a telephone call from informant AMB1-12-04. The informant stated that they had personally been to the property of "Bill McKelvey" on Grange Hall Road. The informant stated that they saw a marijuana grow on the property. The informant stated that the plants were located in plastic five gallon buckets and were sitting in the sun. The informant also stated that McKelvey had greenhouses on the property where he would move the plants to at night. The informant estimated that there were 30 marijuana plants outside where the informant could see the plants. The informant also speculated that there were more marijuana plants on the property located in other greenhouses and inside some of the buildings. The informant further stated that while they were on the property they overheard a conversation where McKelvey was attempting to purchase a firearm. I know based on my training and experience that one plant can yield approximately four ounces to one pound of harvested marijuana. Based on my training and experience I know that 30 marijuana plants is a distribution quantity of marijuana.

This informant was used in one prior unrelated purchase of controlled substances and the informant in that case was deemed credible. Information from the informant about dealers of controlled substance in the Fairbanks Area has also been deemed to be credible by law enforcement independent of the informant. The informant has numerous crimes of dishonesty which have been attached to the affidavit. The informant is currently working in conjunction with law enforcement for consideration on pending charges.

I know John William McKelvey III through previous case involvement. In 2009, reference AST case 09 -21364, the Fairbanks Drug Unit served a warrant on McKelvey's property and found 76 marijuana plants in various stages of growth on the same property described by AMB1-12-04 in 2012. The warrant in 2009 was served in March. The plants were located in a shop on McKelvey's property. Also found during the service of that warrant were numerous firearms. I know that McKelvey is a felon resulting out of previous cases.

A check in APSIN revealed that McKelvey lists a Grange Hall Road address as the fourth driveway on the right hand side. The check in APSIN also revealed that McKelvey has an active \$250 Fairbanks AST warrant for an outstanding FASAP PTR.

On 8/24/12 at approximately 1400 hours, I requested the assistance of AWT to fly me over McKelvey's property on Grange Hall Road. While flying over the property I saw and photographed the property. There were two greenhouses on the property. One greenhouse was partially see through. I could only discern that there were what appeared to be plants potted inside five gallon buckets located inside the greenhouse. I could also see a second greenhouse on the property as well as a portable car port which are also commonly used for greenhouses. The information provided by the informant was consistent with what was viewed from the fly over of the property. The door to the shop on the property was also open; however, I did not see any individuals. Photos of the property have been attached to the affidavit.

I am requesting the courts permission to search the previously mentioned property for items relating to the possession, manufacture, and/or sale of controlled substances, particularly marijuana. Items included in attachment "A" Marijuana. Forensic examination and search of digital media to include but not limited to electronic storage devices, cell phones, computers and all items listed in attachment "B" electronic devices.

Exc. 402**EXHIBIT B** *Bge 1 of 1*

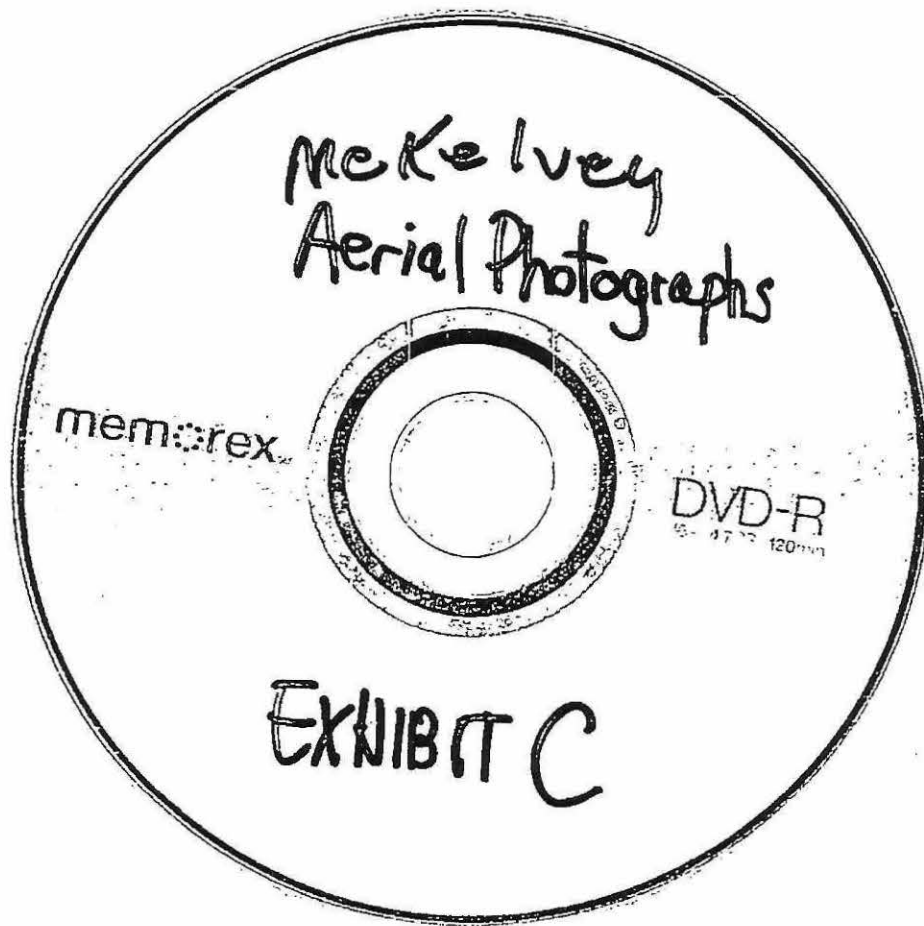


EXHIBIT C

Exc. 403



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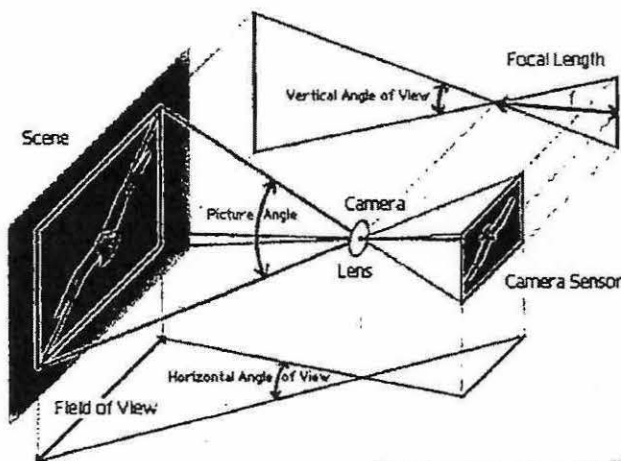
Glossary

Focal Length

Contributed by 123di.com

Vincent Bockaert, 123di.com

The focal length of a lens is defined as the distance in mm from the optical center of the lens to the focal point, which is located on the sensor or film if the subject (at infinity) is "in focus". The camera lens projects part of the scene onto the film or sensor. The field of view (FOV) is determined by the angle of view from the lens out to the scene and can be measured horizontally or vertically. Larger sensors or films have wider FOVs and can capture more of the scene. The FOV associated with a focal length is usually based on the 35mm film photography, given the popularity of this format over other formats.



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In 35mm photography, lenses with a focal length of 50mm are called "normal" because they work without reduction or magnification and create images the way we see the scene with our naked eyes (same picture angle of 46°).

Wide angle lenses (short focal length) capture more because they have a wider picture angle, while tele lenses (long focal length) have a narrower picture angle. Below are some typical focal lengths:

Typical focal lengths and their 35mm format designations

| | |
|--------------|------------------|
| < 20mm | Super Wide Angle |
| 24mm - 35mm | Wide Angle |
| 50mm | Normal Lens |
| 80mm - 300mm | Tele |
| > 300mm | Super Tele |

A change in focal length allows you to come closer to the subject or to move away from it and has therefore an indirect effect on perspective. Some digital cameras suffer from barrel distortion at the wide angle end and from pincushion distortion at the tele end of their zoom ranges.

35mm Equivalent Focal Length

Focal lengths of digital cameras with a sensor smaller than the surface of a 35mm film can be converted to their 35mm equivalent using the focal length multiplier.

Optical Zoom (X times zoom) and Digital Zoom

Optical zoom = maximum focal length / minimum focal length
For instance, the optical zoom of a 28-280mm zoom lens is 280mm/28mm or 10X. This means that the size of a subject projected on the film or sensor surface will be ten times larger at maximum tele (280mm) than at maximum wide angle (28mm). Optical zoom should not be confused with digital zoom.

This article is written by Vincent Bockaert,
author of The 123 of digital imaging Interactive Learning Suite
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What is focal length: definition, comparison, every question answered

What is focal length: definition, comparison, every question answered

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What is focal length, many new photographers ask? Focal length is just how long a lens is, right? There's more to understanding focal length than just knowing the range of numbers. In this tutorial we'll answer some of the common questions photographers have about focal length, as well as compare the effects different lenses can produce.

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preferences [here](#).Exc. 405



Exc. 406

Contrary to common belief, focal length isn't a measure of how long or short a lens is physically, but the distance in millimetres from the optical centre of a lens to the imaging sensor when the lens is focused at infinity.

Rather than being fazed by the physics, it's easier to think of the way in which focal length affects image size.

For a camera with a full-frame sensor, for example, a standard lens (one that gives a similar perspective to the human eye) is 50mm.

Lenses with focal lengths less than 50mm are referred to as wide-angles – simply because they have a wider angle of view. Lenses with focal lengths greater than 50mm are known as telephotos, and these offer greater magnification thanks to their much narrower angle of view.

Angle of view? What's that?

Essentially, the angle of view is the amount of a scene that a lens can take in, measured in degrees. For instance, a fisheye lens may offer an extremely wide 180° angle of view, meaning that it can capture everything in front of it (and to each side). A 200mm lens, on the other hand, will offer a much narrower angle of view of 12.3°. This allows you to fill the frame with a considerably smaller amount of the scene that you're trying to photograph.

You mentioned a 'full frame' sensor earlier. Why is that relevant?

Full-frame sensors get their name because, at 36x24mm, they have similar dimensions to a frame of 35mm film. This means that they capture the full angle of view offered by a lens that's been designed for a film or full-frame camera.

So a 75-300mm zoom lens mounted on a full-frame DSLR like the Canon EOS 5D Mark III or Nikon D800 offers a true focal length of 75-300mm.

However, the majority of cameras have sensors that are significantly smaller than full-frame.

Consequently, they're exposed to a smaller area of the image projected by the lens, and it's for this reason that they're known as 'cropped' sensors – although they're not really cropping the image, they're just capturing a smaller area of the scene at the centre the lens.

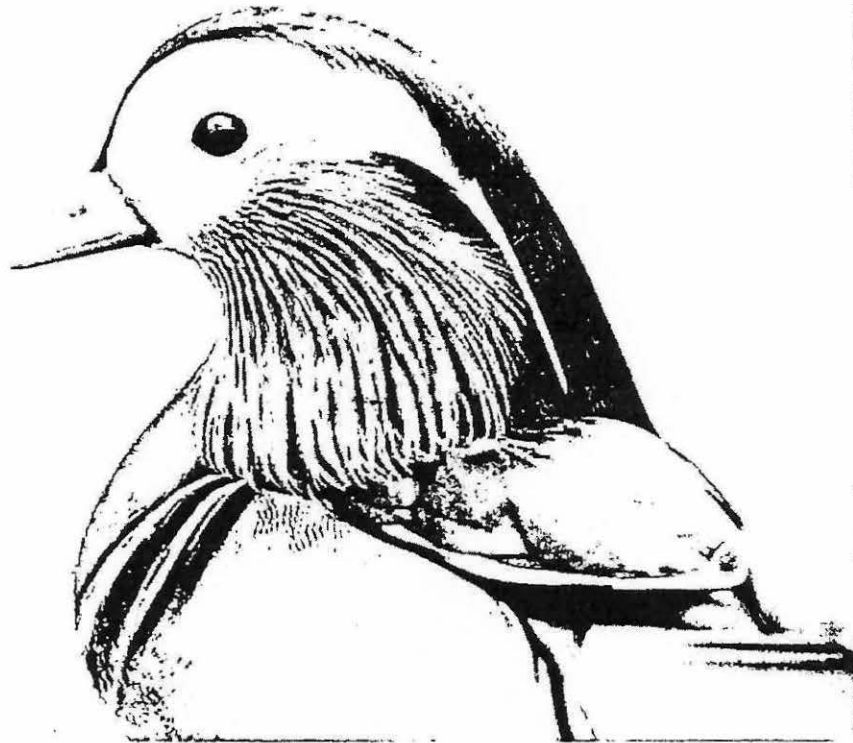
Does this make a difference to how I take pictures?

Yes it does. Using the same lens at the same distance from the subject, a cropped sensor camera will capture a narrower angle of view than a full-frame camera.

This can be a problem when photographing landscapes with a wide-angle lens, as you won't be able to get as much of the scene in the picture (at least, not without moving further away and making everything smaller in the picture).

On the other hand, it's good news for wildlife photographers, with animals and birds appearing larger in the frame thanks to the increased effective focal length.

Exc. 407



What do you mean by the effective focal length?

You'll see this term, or the more frequently used '35mm equivalent focal length', listed in a lens's specs.

It provides a standard measure by which different lens and camera combinations can be compared, and it's calculated by taking a lens's focal length and multiplying it by the crop factor of your camera's sensor.

For instance, the micro four thirds sensor used in an Olympus PEN camera is around half the size of a full-frame sensor. This means that a subject will appear twice as big in the frame when shot on a PEN.

To get the same magnification for a subject using a 35mm full-frame camera, you would need a lens with double the focal length.

The APS-C sized sensors found in most SLRs are slightly bigger than micro four thirds, but they still capture a smaller area than full-frame; Canon DSLRs have a crop factor of x1.6, while Nikon camera bodies are closer to x1.5.

So, a 75-300mm lens becomes a 120-480mm lens when it's used on a camera like the Canon EOS 650D?

In terms of effective focal length, yes. But a 75-300mm lens is still a 75-300mm lens, whether it's attached to a cropped-sensor camera or a full-frame one.

The perspective is constant, as is the image magnification – all that changes is the angle of view. To get around this problem, manufacturers also make a range of dedicated 'digital only' lenses.

What are digital lenses?

Exc. 408

These are lenses that have been designed to work on cropped-sensor cameras. A crop factor still has to be applied to arrive at their effective focal length, but they're smaller and (usually) wider than 35mm full-frame lenses.

So a 10-20mm digital lens gives an effective focal length of around 16-35mm (10-20mm x 1.6 or 1.5, depending on the camera model). Digital lenses are not compatible with full-frame bodies, as they can't produce an image big enough to fill the larger sensor.

PAGE 1: Focal length definition and common questions

PAGE 2: Understanding Focal Length: wideangle vs telephoto

PAGE 3: Focal length comparison cheat sheet

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
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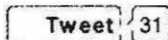
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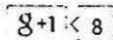
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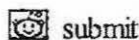
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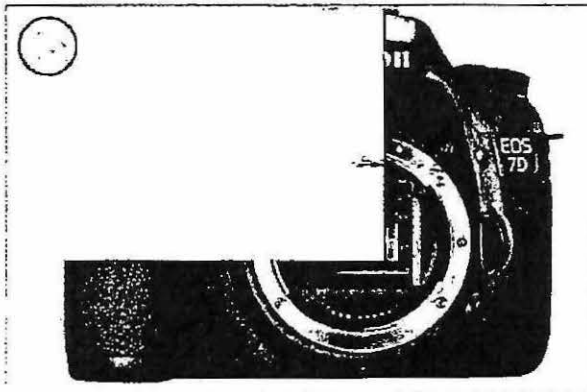
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Type

Digital, AF/AE single-lens reflex camera with built-in flash

Recording Media

CF Card Type I and II, UDMA-compliant CF cards, via external media (USB v.2.0 hard drive, via optional Wireless File Transmitter WFT-E5A)

Image Format

22.3 x 14.9 mm (APS-C size)

Compatible Lenses

Canon EF lenses including EF-S lenses (35mm-equivalent focal length is approx. 1.6x the lens focal length)

Lens Mount

Canon EF mount

Image Sensor

BACK TO TOP

Type

High-sensitivity, high-resolution, large single-plate CMOS sensor

Pixels

Effective pixels: Approx. 18.0 megapixels

Pixel Unit

4.3 μ m square

Total Pixels

Approx. 18.0 megapixels

Aspect Ratio

3:2 (Horizontal: Vertical)

Color Filter System

RGB primary color filters

Low Pass Filter

Fixed position in front of the CMOS sensor

Dust Deletion Feature

(1) Automatic Sensor Cleaning

Removes dust adhering to the low-pass filter.

Self-cleaning executed automatically (taking 2 sec.) when power is turned on or off. Manual execution also possible (taking 6 sec.).

Low-pass filter has a fluorine coating.

(2) Dust Delete Data appended to the captured image

The coordinates of the dust adhering to the low-pass filter are detected by a test shot and appended to subsequent images.

The dust coordinate data appended to the image is used by the provided software to automatically erase the

Exc.

410

Robert John
Law Office of Robert John
P.O. Box 73570
Fairbanks, Alaska 99707
907-456-6056/907-456-6057 (FAX)
Attorney for John William McKelvey III

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,

Plaintiff,

vs.

JOHN WILLIAM McKELVEY III,

Defendant.

Case No. 4FA-14-00040 CR

FILED in the Trial Courts
State of Alaska Fourth District

AUG 15 2014

By _____ Deputy

AFFIDAVIT OF JOHN WILLIAM McKELVEY, III

VRA Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

JOHN WILLIAM McKELVEY, III, being first duly sworn, deposes and states as

follows:

1. I am the accused in this case.

Exc. 411

000535

2. I rent to own a secluded residence in the isolated outskirts of Fairbanks off of Grange Hall Road. Throughout 2012, I lived in that residence.

3. On that property, in the curtilage of my home, I keep a shop, multiple vehicles, a carport, a hot tub, a motor home, and a few greenhouses. The one greenhouse at issue in this case is in back of my home and is fully enclosed and opaque so one cannot identify its contents unless one is standing right next to or in it.

4. Visitors who enter my property through its gravel driveway are greeted from the left with signs reading: Private Property, KEEP OUT, and NO TRESPASSING. The right side of the driveway reiterates the admonition: Private Property, KEEP OUT, and NO TRESPASSING. If someone attempted to approach my home from either of the two tree lines surrounding my property, he or she would inevitably run into one of the many signs posted on the trees reading "POSTED PRIVATE PROPERTY. HUNTING, FISHING, TRAPPING, OR TRESPASSING FOR ANY PURPOSE IS STRICTLY FORBIDDEN. VIOLATORS WILL BE PROSECUTED."

5. I enjoy my privacy and have always had an expectation of privacy that planes will not be flying over my property for the purpose of observing my home and its curtilage and would not be doing so using telephoto-lens cameras for observing and taking photographs of my home and its curtilage. If someone were legally flying over my property in a commercial or other private plane, he or she would obtain at most a nondescript passing glance at my home and property.

Exc. 412

6. Prior to the afternoon Trooper Moore flew over my property, I had never observed a plane fly directly over my property. On occasion, I have seen passenger planes in the area, en route to or from Chena Hot Springs, but any such planes were several times higher than the one I observed fly over my home toward the end of August in 2012. At that time, from the doorway of my shop I looked up and observed a dark-colored plane fly over my home. The plane was about one-hundred to two-hundred feet above my tree line, so about three-hundred to four-hundred feet above my home. As I looked up, I observed a face in the window of the plane peering back down at me and my home. I believe Trooper Moore was in that plane.

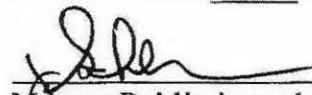
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 14 day of August, 2014.


JOHN WILLIAM MCKELVEY III

SUBSCRIBED and SWORN TO before me this 14 day of August, 2014.




Notary Public in and for the State of Alaska
My commission expires: EMPLOYMENT

Certificate of Service

I hereby certify that a true copy of
the above document was hand-delivered to:

Elizabeth F. Crail
District Attorney's Office
this 15th day of August, 2014.

Law Office of Robert John

By: 

Exc. 413

are both entitled to equal constitutional protection under the Fourth Amendment and Article I §§ 14 and 22 of the Alaska Constitution. Article I § 22 of the Alaska Constitution entitles Alaskans to a greater standard of privacy than the United States Constitution and was adopted, in part, to prevent the law enforcement from utilizing advances in technology to infringe upon personal privacy.

DISCUSSION

1. Mr. McKelvey's Greenhouse Is Within The Curtilage Of His Home.

The Fourth Amendment's protections extend to the curtilage of a home, "the area around the home to which the activity of home life extends."¹ The central component in ascertaining an area to be "curtilage" is that the area "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life."² In determining whether an area is within the curtilage, the Supreme Court has outlined four factors to consider: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."³ The open-fields exception applies only to areas that are not within the curtilage.⁴

¹ *Oliver v. United States*, 466 U.S. 170, 182 n.12, 104 S.Ct. 1735, 1743 n.12, 80 L.Ed.2d 14 (1984) (quotation and citation omitted).

² *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987) (quotation and citations omitted).

³ *Id.*, 480 U.S. at 301.

⁴ *Id.* at 300.

Mr. McKelvey's greenhouse is unmistakably within the area associated with the sanctity of his home and private life and as such is within the curtilage of his home. Mr. McKelvey's greenhouse is approximately 10-15 feet behind his cabin in a patch of grass between the cabin and the driveway leading to his shop.⁵ The greenhouse is in an area of Mr. McKelvey's property that is enclosed by a natural fence of tall trees; indeed, absent an airplane, it would be impossible to see Mr. McKelvey's greenhouse. There are no physical barriers between the greenhouse and the cabin that would indicate the greenhouse is a distinct portion of the property. The greenhouse is used for private activities as an extension from the cabin. In fact, the greenhouse is more akin to a spare bedroom than a separate building. The greenhouse is directly behind Mr. McKelvey's home, in an area of the property that a passerby would not see into without using an airplane. Even those who make it past the multitude of no trespassing signs in the driveway would not be able to see the greenhouse absent a clear departure from the path to the front door.

Mr. McKelvey's greenhouse is undeniably in the curtilage of his home as is the entire space that is enclosed by the natural tree line. Since the greenhouse, shop, and other structures visible in the pictures of Mr. McKelvey's home are all in the curtilage, the full weight of the protections of the Fourth Amendment and Article I §§ 14 and 22 are applicable to the warrantless aerial search of Mr. McKelvey's home, greenhouse, and curtilage.

⁵ See Exhibit C. Exhibits A through F were attached to Mr. McKelvey's memorandum in support of this motion. Additional Exhibits G, H, and I are attached hereto.

2. The Plurality Opinion In *Florida v. Riley* Is Not The Law Of The Land.

The assertion of the State that the plurality opinion in *Florida v. Riley*⁶ is “the law of the land” is inconsistent with the Supreme Court’s instruction in determining the holding of a fragmented court. In *Marks v. United States* the Court instructed, “when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁷ In *Florida v. Riley* Justice O’Connor’s concurrence is the most consistent with *California v. Ciraolo* and as a result is the narrowest basis of decision and thus the holding.

The *Ciraolo* Court utilized the *Katz* test to determine whether the citizen’s expectation of privacy had been violated.⁸ In applying the second prong of the *Katz* test the Court determined:

In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.⁹

The Plurality in *Riley* based its decision on the fact that as the helicopter was flying at a legal altitude “any member of the public could legally have been flying over Riley’s

⁶ *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L. Ed. 2d 835 (1989).

⁷ *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quotation and citation omitted).

⁸ See *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L. Ed. 2d 210, 215 (1986).

⁹ *Id.*, 476 U.S. at 215 (emphasis added).

property.”¹⁰ Justice O’Connor, in contrast, did not place the reach of Fourth Amendment’s protections within the Federal Aviation Administration’s safety standards. Consistent with *Ciraolo* and *Katz* Justice O’Connor’s analysis asked “whether the helicopter was in the public airways at an altitude which members of the public travel with sufficient regularity that Riley’s expectation of privacy”¹¹ was not reasonable.

The *Ciraolo* Court did not ignore the *Katz* test; nor did the *Ciraolo* Court base its decision on the fact that members of the public could legally fly over an area. The *Ciraolo* Court determined that since air traffic from the altitude of 1,000 feet and higher is routine, it is unreasonable to “require law enforcement officers to shield their eyes” when flying at an altitude of 1,000 feet. In *Riley*, Justice O’Connor’s decision is the decision on the narrowest grounds as it is the only opinion that upholds the judgment of the Court and applies the same analysis as *Ciraolo* via *Katz*. As such, O’Connor’s decision is the proper holding of *Florida v. Riley* for the purposes of the Fourth Amendment analysis required in Mr. McKelvey’s case.

Justice O’Connor’s analysis required a determination as to the frequency of overhead travel. If a person is in an area where “the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and [the defendant] cannot be said to have knowingly exposed his greenhouse to public view.”¹²

¹⁰ *Riley*, 488 U.S. at 451.

¹¹ *Id.* at 454 (O’Connor, J., concurring in the judgment).

¹² *Id.* at 455 (brackets added) (quotation and citation omitted).

Mr. McKelvey's home is not near any high-traffic airports; his home is in the isolated outskirts of Fairbanks. Mr. McKelvey maintains that while there is some air-traffic in the area around his home, any such air traffic does not fly at an altitude as low as Trooper Moore's police airplane flew; nor has an airplane ever flown directly over his home. While the State does note that air travel is commonplace in Alaska, that does not imply that air travel at the altitude of 300 feet to 1000 feet is commonplace. As such, Mr. McKelvey's expectation that he and his home are not subject to warrantless targeted aerial police surveillance from an altitude vantage point of less than 1,000 feet is an expectation that society should recognize as reasonable.

3. Kyllo's Holding As It Applies To The Home Applies To This Case Since Mr. McKelvey's Greenhouse Is Within The Curtilage Of His Home.

The State maintains that *Kyllo*¹³ is not relevant to Mr. McKelvey's case and that the camera lens which heightened Trooper Moore's sight to approximately nine times what he would have seen with his naked eye qualifies as naked-eye observations. The facts of *Kyllo* uncontestably related to images of the inside of a home. However, the curtilage is "part of the home itself for Fourth Amendment purposes."¹⁴ As such, it is irrelevant whether police obtain information from inside of the home or inside of the curtilage. The force of the Fourth Amendment is at its greatest in either case.

Trooper Moore used sense-enhancing technology to peer inside of Mr. McKelvey's greenhouse, which was inside of Mr. McKelvey's curtilage. Using the

¹³ *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed. 2d 94 (2001).

¹⁴ *Florida v. Jardines* __U.S.__, 133 S.Ct. 1409, 1414, 185 L.Ed.2d 495 (2013) (citing *Oliver v. United States*, 466 U.S. at 180).

sense-enhancing technology, Trooper Moore was able to identify what he believed to be "plants potted in five gallon buckets."¹⁵

The technology used by Trooper Moore was not simply a camera with a sense-enhancing lens. Trooper Moore combined the sense-enhancing device with an airplane. It is the combination of the on-demand airplane and the sense-enhancing lens that is prohibited within *Kyllo*, as the combination is not in general public use. This conclusion is further supported by the explicit instruction of the Supreme Court that when aurally observing a home, such observation must be performed with the naked eye.¹⁶

4. **Where The Privilege And Protection Of The Fourth Amendment End,
The Privilege And Protection Of Article I §§14 And 22 Continue.**

Early in this State's history the Alaska Supreme Court declared: "To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities."¹⁷ As Justice Connor noted in *Baker v. Fairbanks*, Alaska Courts are "under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language...."¹⁸ The *Breese* Court further noted that while some of the terms in the Alaska Constitution

¹⁵ Exhibit B.

¹⁶ *Cf. Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed. 2d 226 (1986) (upholding aerial surveillance with a technologically-advanced camera where that surveillance was of a 2000-acre outdoor manufacturing plant); *id.*, 476 U.S. at 237 n.4, 106 S.Ct. at 1826 n.4 ("We find it important to note that this is *not* an area immediately adjacent to a private home, where the protections of privacy are most heightened.") (*italics in Dow*).

¹⁷ *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

¹⁸ *Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970).

parallel those of the United States Constitution, "we have repeatedly held that this court is not obliged to interpret our constitution in the same manner as the Supreme Court of the United States has construed parallel provision of the United States Constitution."¹⁹

Alaska's right to privacy may be "one of the most well-known indicators of Alaska's judicial independence."²⁰ Those who proposed and advocated for Article I § 22 saw the amendment, as a way to ensure "that we have a possible defense to invasion of privacy."²¹ Article I § 22 advocates' anticipated that "we are moving into an electronic age and this will give a measure of protection and would prevent excesses in this field."²² Article I § 22 was proposed, passed, and adopted by the citizens of Alaska with the future interest of Alaskans in mind. The amendment served as a pre-emptive check on the looming threat advances in technology pose to Alaskans' sense of privacy.

On a continuum of the level of privacy, a state constitution such as Alaska's which ensures to citizens a greater level of privacy than that granted through the United States Constitution is at one end. At the other end is California's Article I § 24, which explicitly forbids a greater level of privacy than that allotted by the United States Constitution.²³

¹⁹ *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972).

²⁰ Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardener: Alaska's Independent Approach to State Constitutional Interpretation*, 12 Alaska L.Rev. 1, 17 (1995).

²¹ Exhibit G (Alaska House Judiciary Committee: Minutes of The Meeting, May 30, 1972) at 1.

²² *Id.*

²³ See California Constitution, Article I § 24 ("In criminal cases the rights of a defendant to ... be free from unreasonable searches and seizures, to privacy... shall be construed by the courts of the State in a manner consistent with the Constitution of the United States. *This Constitution shall not be construed by the courts to afford greater rights to criminal*

Similarly, Article I § 12 of the Florida Constitution, the section relating to search and seizure, includes a provision construing those rights in conformity with the United States Supreme Court's interpretation of the Fourth Amendment.²⁴

Alaska's Constitutional standard of privacy would be unconstitutional under California and Florida law. Given the fundamental difference between the levels of privacy promised within Alaska's Constitution versus Florida's and California's Constitutions, it is neither reasonable nor logical to rely upon those States for guidance in the matter of warrantless aerial police surveillance. In contrast, the decisions rendered in *State v. Bryant*²⁵ and *State v. Davis*²⁶ are on point with Article I § 22's promise that Alaskans' right to privacy shall not be infringed.

When determining whether a right to privacy is reasonable, this Court must perform a value judgment asking "whether if a particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedoms remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."²⁷ This court must consider the implications a decision upholding warrantless police aerial surveillance would have on the expectation of privacy enjoyed by all citizens of this State. A State whose citizens

defendants than those afforded by the Constitution of the United States . . .") (ellipses and emphasis added).

²⁴ See Florida Constitution, Article I § 12 ("This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court.").

²⁵ *State v. Bryant*, 950 A.2d 467, 470 (Vermont 2008).

²⁶ *State v. Davis*, 321 P.3d 955, 961 (N.M. App. 2014), *cert. granted*, 324 P.3d 376 (N.M. 2014).

²⁷ *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001).

did a little more than forty years ago come together to voice their spirit and intent: "The right of the people to privacy is recognized and shall not be infringed."²⁸

The State attempts to rely on modern-day advances in technology, such as Google Earth, to justify the aerial invasion over Mr. McKelvey's home. However, the infringement of privacy threatened by advances in technology is the precise evil that those who proposed Article I § 22 foresaw and sought to prevent. In any event, Google Earth provides images that are collected over a period of time ranging from approximately one to three years old; the pictures are not in real time.²⁹ Had the State relied on a Google Earth image of Mr. McKelvey's home to obtain a warrant, it is unlikely such stale information could have supported probable cause. In fact, the Google Earth image provided by the State captures Mr. McKelvey's expectation of privacy; the view of his home from the air is nothing more than a fleeting and indiscriminating glance.

In essence, under Article I, §14 and 22 of the Alaska Constitution, the Court should adopt the reasoning of the four dissenting Justices in *Ciraolo*. As Professor LaFave explains:

[T]he most sensible way to apply the *Katz* justified-expectation-of-privacy test is to characterize police surveillance as a search unless it occurs from a "public vantage point" and uncovers what the person has not protected from scrutiny by the "curious passerby." Under that approach, the *Ciraolo* case should have come out the other way. The fact that the aircraft was in "public navigable airspace" does show that the surveillance occurred from a "public vantage point," but that is all. As the four *Ciraolo* dissenters correctly observed:

²⁸ Exhibit H (Official Primary Election Ballot, August 22, 1972) at Ballot 3.

²⁹ See Exhibit I (Understanding Google Earth Imagery) (<https://support.google.com/earth/answer/176147?hl=en>).

the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities and might connect those activities with particular people, is simply too trivial to protect against. ***

***The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards.³⁰

In other words, the majority opinion in *Ciraolo* is a manifestation of what the Alaska Court of Appeals has referred to as the United States Supreme "Court's surreal and Orwellian view of personal security in contemporary America,"³¹ while the dissenting Justices in *Ciraolo* embody the ordered liberty of The Last Frontier -- the Alaskan spirit and mindset manifested in Article I, §§14 and 22 of the Alaska Constitution.

In sum, Alaskans' spirit of freedom and independence is embedded in Article I §§14 and 22 of our Constitution which envisions this Court as the guardian upholding its explicit promises of privacy. However well intentioned Trooper Moore might have been

³⁰ 2 Wayne R. LaFare *Search and Seizure*, §2.3(g) at 799-800 (5th ed. 2012) (footnote omitted, brackets added); see Catherine Hancock, *Justice Powell's Garden: The Ciraolo Dissent And Fourth Amendment Protection For Curtilage-Home Privacy*, 44 San Diego L.Rev. 551 (2007).

³¹ *Joseph v. State*, 145 P.3d 595, 604 (Alaska App. 2006) (quotation and citation omitted).

in his actions, the warrantless aerial police surveillance performed by law enforcement in this case is at fundamental odds with the spirit, promises, and protections of Alaska's Constitution as set forth in Article I §§ 14 and 22 and enforced by the judicial branch. The erosion of fundamental rights which has occurred in Mr. McKelvey's case cannot be condoned; this Court must suppress all evidence obtained from and as a result of the warrantless aerial search of Mr. McKelvey's home.

CONCLUSION

The warrantless aerial police surveillance of Mr. McKelvey's home and curtilage was performed in violation of the Fourth Amendment to the United States Constitution and Article I §§ 14 and 22 of the Alaska Constitution. The resulting evidence was thus illegally obtained and must be suppressed. Mr. McKelvey respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this 26th day of September, 2014.

LAW OFFICE OF ROBERT JOHN



Robert John
Alaska Bar No. 8911069
Attorney for John McKelvey

Certificate of Service

I hereby certify that a true copy of
the above document was hand-delivered to:

Elizabeth F. Crail
District Attorney's Office
this 26th day of September, 2014.

Law Office of Robert John

By: 

HOUSE JUDICIARY COMMITTEE
MINUTES OF THE MEETING
Tuesday, May 30, 1972

Chairman Moran called the meeting to order at 2:55 p.m. in the Masonic Temple. Present were: Flynn, Rose, Barber, Hillstrand, Banfield, and Randolph.

No-fault
Insur.

SCR - 20. Study of no-fault insurance. Moran noted that there is a great deal of interest in no-fault insurance and the House passed HB-464. We do not know if the Senate will act on this so, the Chairman has asked Art Peterson to prepare a CS to reflect the concept of continuing study. Randolph moved and asked unanimous consent to sign out the CS for SCR-20. Hillstrand objected. He noted that we had passed HB-464 and now to sign a resolution for a study would be ridiculous. He also felt this would allow the Senate to kill the bill. Randolph felt that if the bill became law this resolution could be ignored, but if the bill failed this would give some indication that we wanted the Legislative Council to spend some time on this problem. Hillstrand did not feel it was an advantage to move from a position of strength to one of weakness. SCR-20 was signed out with individual recommendations.

SCR 20
HB 464

90-day
session

SJR-73 - 90-day sessions. Rose moved to table this measure. Banfield, Barber, Rose and Flynn voted to table. Hillstrand moved that the measure be removed from the table and placed for action. Rose did not think this was a proper motion procedurally. Randolph moved to rescind our action in tabling. The motion failed with Barber, Banfield, Flynn, and Rose against the motion.

SJR 73

Randolph moved to adjourn. Randolph and Hillstrand voted to adjourn. Motion failed.

Individuals
right to
privacy

SJR-68am - Individual's right to privacy. Rose moves that we report this out with a "Do Pass" recommendation. Banfield objects. Rose stated that this makes sure that we may have a possible defense to invasion of privacy. We are moving into an electronic age and this will give a measure of protection and would prevent excesses in this field. Art explained about the right of privacy. It seems personally advisable to add this to the constitution if you are concerned about vagueness. This is more specific than other general laws which are statements of principles. He gave an example of the 27th amendment. There have been instances where women were not accorded due process on the basis of sex distinction and where something like the 27th amendment would have been helpful. Moran wondered about the phrase "shall not be violated". What really is the right to privacy? This needs to be defined. Barber moved to delete that phrase. Art checked other laws as to how they were written. Moran then suggested that we stop after "recognized" and say it "shall be implemented by the Legislature". Banfield read from lines 13-15. Moran didn't think this should be in the constitution. Art said that Moran's amendment would cover the question by Banfield.

SJR 68
am

426
Exc.

5/30

Individuals Moran said that he would like to see the people have the
 Right to right to privacy but would like it phrased like other sec-
 Privacy tions of the constitution. Banfield moved to delete the
 second sentence. There was no objection. Art said we could
 say "shall implement this section" or "shall provide for the
 implementation of this section" and leave out the details.
 This would be stating principles generally without the details
 which allows for easier administration. Barber felt that we
 were leaving out the penalty section. Moran said this would
 be covered in the "implementation". Rose agreed that leaving
 the entire first sentence with the broad general language of
 the second sentence providing for legislative implementation
 would be entirely adequate. It was decided to change "violate"
 to "infringe". A CS will be prepared by Art.

SJR 61
am

Meeting adjourned at 3:35 p.m.

Exc. 427

OFFICIAL PRIMARY ELECTION BALLOT August 22, 1972

- Mark only by use of cross marks, "X" marks, checks, or plus signs. Place marks at the left of the names of the candidates for whom you desire to vote.
- Mark must be inside or touching the square so as to indicate the intent of the voter. Erasures and corrections will invalidate only that part of the ballot in which they appear.
- Do not vote for more than the indicated number of names for each office.
- If you spoil or mar your ballot, you may return it to the election judge and receive another ballot. Your spoiled ballot will be destroyed in your presence.

United States Senator

(Vote for one)

- | | | |
|--------------------------|--------------|------------|
| <input type="checkbox"/> | STEVENS, TED | Republican |
| <input type="checkbox"/> | GUESS, GENE | Democrat |

United States Representative

(Vote for one)

- | | | |
|--------------------------|--------------|------------|
| <input type="checkbox"/> | STEVENS, RED | Republican |
| <input type="checkbox"/> | YOUNG, DON | Republican |
| <input type="checkbox"/> | BEGICH, NICK | Democrat |

State Representative

(Vote for two)

- | | | |
|--------------------------|-----------------------|------------|
| <input type="checkbox"/> | BOARDMAN, BILL | Republican |
| <input type="checkbox"/> | FREEMAN, ORAL E. | Democrat |
| <input type="checkbox"/> | CARDINER, TERRY | Democrat |
| <input type="checkbox"/> | MOORE, PATRICIA (Pat) | Republican |
| <input type="checkbox"/> | VIEIRA, CARL E. | Democrat |
| <input type="checkbox"/> | WHITTAKER, RICHARD | Democrat |
| <input type="checkbox"/> | ANDERSON, GEO. W. | Democrat |

Constitutional Amendment

Ballots

Ballot 1

As Proposed By

House Joint Resolution No. 126

Title: **RESIDENCY REQUIREMENT FOR VOTING**

Proposition: Shall section 1, article V of the Alaska Constitution be amended (underlined portions to be added; bracketed and capitalized portions to be stricken) to read in part as follows: QUALIFIED VOTERS. Every citizen, . . . at least eighteen years of age, who meets registration residency requirements . . . prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day [FOR ONE YEAR A RESIDENT OF ALASKA AND FOR THIRTY DAYS A] resident of the election district in which he seeks to vote, . . .

☐ FOR ☐ AGAINST

Ballot 2

As Proposed By

House Joint Resolution No. 102

Title: **PROHIBITION OF SEXUAL DISCRIMINATION**

Proposition: Shall section 3, article I of the Alaska Constitution be amended by adding a new word (underlined word to be added) to read as follows:

CIVIL RIGHTS. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section.

☐ FOR ☐ AGAINST

Ballot 3

As Proposed By

Senate Joint Resolution No. 68

Title: **RIGHT OF PRIVACY**

Proposition: Shall article I of the Alaska Constitution be amended by adding a new section to read:

RIGHT OF PRIVACY. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

☐ FOR ☐ AGAINST

Ballot 4

As Proposed By

Senate Joint Resolution No. 52

Title: **BOROUGH ASSEMBLIES**

Proposition: Shall section 4, article X of the Alaska Constitution be amended by striking the last two sentences of the present section (bracketed, capitalized sentences to be stricken) which reads:

ASSEMBLY. The governing body of the organized borough shall be the assembly, and its composition shall be established by law or charter. [EACH CITY OF THE FIRST CLASS, AND EACH CITY OF ANY OTHER CLASS DESIGNATED BY LAW, SHALL BE REPRESENTED ON THE ASSEMBLY BY ONE OR MORE MEMBERS OF ITS COUNCIL. THE OTHER MEMBERS OF THE ASSEMBLY SHALL BE ELECTED FROM AND BY THE QUALIFIED VOTERS OUTSIDE SUCH CITIES.]

☐ FOR ☐ AGAINST

Ballot 5

As Proposed By

Senate Joint Resolution No. 10

Title: **LIMITED ENTRY FISHERIES**

Proposition: Shall section 15, article VIII of the Alaska Constitution be amended by adding a sentence to the present section (underlined sentence to be added) which would read as follows:

NO EXCLUSIVE RIGHT OF FISHERY. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

☐ FOR ☐ AGAINST

Exc. 428

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000468

[Help](#)

Understanding Google Earth imagery

When is imagery collected?

Google Earth acquires the best imagery available, most of which is approximately one to three years old. The information in Google Earth is collected over time and is not in 'real time'. For example, it's not possible to see live changes in images.

To get the latest imagery updates, check out [Follow Your World](#).

High vs. low resolution imagery

Google Earth is constantly working on gathering the highest resolution imagery possible. However, there are certain areas for which we don't currently provide high-resolution data. We're also aware that the imagery for some areas may contain cloud coverage or discoloration, so might appear blurry even at high resolution.

You can report this imagery to us at our [database report page](#).

Improving imagery

To learn more about how you can provide data please visit our [Map Content Partners Help Center](#).

The Map Content Partners Help Center contains information for organizations that contribute authoritative mapping data to Google, including 3D models, aerial imagery, public transit routes and schedules, terrain and many types of vector data.

Learn more about [Google Earth's Legal and privacy policies](#).

Policy

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[Imagery sources](#)

Exc. 429

EXHIBIT I Page 1 of 1

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